SUPREME COURT, U.S.

No. 661

Office - Supreme Court, U.S.
FILED
JAN 13 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

JESSIE MAROY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

RUFUS D. MCLEAN,
Acting
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

CASES:

Alexander v. *United States*, 241 F. 2d 351, certiorari denied, 354 U.S. 940	8
Gallegos v. *United States*, 237 F. 2d 694	10
Glasser v. *United States*, 315 U.S. 60	11
Morei v. *United States*, 127 F. 2d 827	9
Rosenberg v. *United States*, 13 F. 2d 369	8
United States v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U.S. 913	8
United States v. *Cohen*, 124 F. 2d 164, certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811	8
United States v. *Moses*, 220 F. 2d 166	8
Willsman v. *United States*, 286 Fed. 852	8

STATUTES:

18 U.S.C. 2, 65 Stat. 717	3, 7, 9
21 U.S.C. (1952 Ed.) 174, 65 Stat. 767	2, 3
26 U.S.C. (1952 Ed., Supp. II) 4704 (a), 68A Stat. 550	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 661

JESSIE MAROY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-6) is reported at 248 F. 2d 663.

JURISDICTION

The judgment of the Court of Appeals was entered on October [illegible], 1957 (Pet. App. 7), and a petition for rehearing was denied on November 13, 1957 (Pet. App. 8). The petition for a writ of certiorari was filed on December 13, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence that petitioner aided and abetted his co-defendant in the illegal purchase and concealment of heroin.

2. Whether the instructions on aiding and abetting were prejudicially repetitious and inconsistent.

3. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to violate narcotics laws.

STATUTES INVOLVED

26 U.S.C. (1952 Ed., Supp. II) 4704(a), 68A Stat. 550, provides:

> (a) General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

21 U.S.C. (1952 Ed.) 174, 65 Stat. 767, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

18 U.S.C. 2, 65 Stat. 717, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner and his co-defendant Minor were tried on counts 1, 2, and 12 of an indictment returned in the United States District Court for the Northern District of Illinois. Count 1 charged the unlawful purchase of heroin on May 10, 1956, in violation of 26 U.S.C. 4704 (a) (*supra*, p. 2); count 2 charged unlawful concealment of the same heroin on that date, in violation of 21 U.S.C. 174 (*supra*, pp. 2-3); and count 12 charged a conspiracy to violate the narcotics laws (R. 7, 8, 11-12). The jury found the defendants guilty on all three counts (R. 298, 319). Petitioner was sentenced to four years' imprisonment on each of counts 1, 2, and 12 with cumulative fines of $500 on each count. The sentence on count 2 was to run concurrently with that on count 1, and the sentence on count 12 was to run consecutively to that under counts 1 and 2 (R. 299-300, 319-320).

Pertinent evidence supporting the convictions may be summarized as follows:

On May 10, 1956, narcotics agent Gjertsen and special employee Cross, a heroin user, were standing in the vicinity of Hoyne and Madison Streets in Chicago (R. 17-18, 107-108, 125). Petitioner drove his 1956 Pontiac sedan to this intersection, and he and defendant Minor alighted (R. 17-18, 220-221, 222-223). Petitioner waved to Cross, and then petitioner and Minor walked toward Cross and Gjertsen (R. 18, 223). After stepping away from the others, Cross said to petitioner, "Look, I have got a friend of mine with me. He wants to put me in business. He don't want to spend too much money because he would like to see what I am going to do first. If I do all right the first time, he said he would do better, you know" (R. 109). Cross told petitioner he wanted "a half a piece of stuff", which meant half an ounce of heroin in narcotics traffic jargon (R. 141, 211). Petitioner replied, "I don't do no business on the street. Besides, I don't do no business with grays [Caucasians][1] anyway. So if you want to talk about it, you have got to see my man" (R. 109, 20). When petitioner and Cross rejoined agent Gjertsen and Minor, Cross introduced petitioner to Gjertsen, who shook hands with petitioner and Minor (R. 19, 109). Gjertsen told petitioner that he "wished to do some business," meaning that he wanted to purchase some heroin (R. 19-20, 110). Petitioner answered, "I don't handle the business, and I won't deal with a gray. If you want to do business you deal with my man." Petitioner pointed to Minor and called him "my man"

---

[1] Gjertsen was a white man and petitioner, Minor, and Cross were Negroes (Pet. App. 3).

(R. 20-21, 52-53, 110-111). Petitioner left the group and walked east on Madison Street (R. 21, 54). When Cross informed Minor that he wanted to buy "half a piece," Minor told Cross and Gjertsen to meet him at the bar on Levitt and Madison Streets (R. 21, 22, 111). Minor then walked east on Madison Street, the same direction in which petitioner had gone a few moments earlier (R. 58). About twenty minutes later, Minor appeared at the designated bar and transferred a package containing 200 grains of heroin to Cross and Gjertsen for $60 (R. 23, 24, 25-27, 112-113, 244-245). There were no federal tax stamps on the package, and the sale was not pursuant to a written order (R. 28-29, 113-114).

On May 22, 1956, Cross was again in the vicinity of Hoyne and Madison Streets, this time with narcotics agent Turnbou. At about 4:30 p.m., they saw petitioner and Minor drive up in petitioner's Pontiac (R. 115-116, 170-171). Cross walked to where petitioner and Minor were standing, and told petitioner he had a friend with him who "wanted to do some business." Petitioner replied, "You know I don't do no business. See my man," and nodded toward Minor (R. 117-118, 172). Cross told Minor in petitioner's presence that he (Cross) had a friend with him who "wanted to get an ounce of stuff." When Minor asked who the friend was, Cross answered, "He is all right. He is over there at the bar, you know" (R. 118). Minor then crossed the street to inspect the automobile which Cross stated that he and Turnbou were using. Upon Minor's return, he said to Cross, "Okay. Meet me on Albany and Washington." All of this conversation occurred in petitioner's presence (R. 118-120). Minor drove petitioner's Pontiac to the vicinity of Albany and

Washington, where he entered an apartment. Petitioner remained on the corner, and Cross rejoined Turnbou (R. 120, 32, 225). Cross and Turnbou drove to Albany and Washington Streets where they saw petitioner's Pontiac parked (R. 120, 173-174). After entering an alley, they met Minor, who delivered to Turnbou a package containing heroin for which Turnbou paid $100. The package bore no federal tax stamps, and the sale was not pursuant to a written order (R. 174-176, 32-36, 226, 245). Minor drove petitioner's Pontiac back to Hoyne and Madison Streets, where petitioner was still standing. After Minor walked toward petitioner, their hands met and they had a short conversation. They they drove off in the Pontiac with petitioner at the wheel (R. 33, 226).

On July 5, 1956 at about 10:00 p.m., agent Turnbou, after a telephone conversation with Minor arranging another heroin purchase, went to the vicinity of Madison and Hoyne (R. 180, 209-211). Shortly thereafter, petitioner and Minor left a building at 111 North Wood Street and petitioner drove a Chevrolet to Madison and Hoyne. After petitioner stopped the car, Minor alighted and joined Turnbou, and then petitioner drove away (R. 36-37, 227-228). Later, in a tavern, Minor delivered to Turnbou a package containing 305 grains of heroin in exchange for $500. There were no federal tax stamps on this package and the sale was not pursuant to a written order (R. 191-196, 246).

Petitioner's testimony on his own behalf conflicted with the government's evidence. As to the May 10, 1956 transaction, petitioner stated that he did not wave to Cross, and told Cross that he could not talk to him (R. 261, 262). Petitioner denied having a conversation

with Gjertsen. He stated that he met Gjertsen for the first time on July 6, 1956, the date of his (petitioner's) arrest (R. 261, 265). Regarding the May 22, 1956 incident, petitioner denied that he saw or had a conversation with Cross (R. 265); and denied knowledge of any narcotics transactions which Minor had with Cross or Turnbou (R. 268). As to the July 5, 1956 transaction, petitioner stated that he had no knowledge that Minor had talked to or had seen Turnbou (R. 267, 268).

The judge's charge to the jury is not transcribed (see R. 298), but in the discussion which preceded the charge the judge noted that the evidence against petitioner would permit his conviction only as an aider and abettor (R. 288). He accordingly gave four of the government's instructions (Nos. 21, 23, 26 and 27) on aiding and abetting (R. 311-315).

ARGUMENT

1. Petitioner challenges his conviction under counts 1 and 2 of the indictment (charging unlawful purchase and concealment of heroin by petitioner and Minor) on the ground that the government's proof failed to show that he had physical possession of the narcotics. It is not necessary, however, that petitioner should have had actual physical possession so long as he aided and abetted Minor (who admittedly had physical possession) in the unlawful purchase and concealment of the narcotics. The jury was fully justified in drawing the inference that (in the words of the aider-and-abettor statute, 18 U.S.C. 2, supra, p. 3) petitioner not merely aided and counseled, but also procured and commanded, the commission of the crime. It is apparent from the evidence that, when Cross and Gjertsen

made overtures to purchase narcotics on May 10, 1956, petitioner and Minor already had heroin on hand and in their control, ready and available for disposition. Moreover, petitioner told the customers to deal with "my man" (Minor). He then walked away, the indication being that Minor could proceed with the sale. And, in fact, delivery was concluded promptly thereafter. See the Statement, *supra*, pp. 4-5.

Petitioner's reliance (Pet. 18-22) upon *Willsman* v. *United States*, 286 Fed. 852 (C.A. 8), is misplaced. There, the evidence was that Willsman never did have the narcotics "under his control" and that he had to travel 14 or 15 blocks as a mere go-between to get Grant who had physical possession of the drugs (286 Fed. at 855, 856). In the instant case, however, both Minor and petitioner were present together initially, and the circumstances strongly supported the inference that both had control of the narcotics. Compare *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied sub nom. *Bernstein* v. *United States*, 315 U.S. 811; *United States* v. *Chiarelli*, 192 F. 2d 528, 530-531 (C.A. 7), certiorari denied, 342 U.S. 913; *Alexander* v. *United States*, 241 F. 2d 351 (C.A. 8), certiorari denied, 354 U.S. 940; *Rosenberg* v. *United States*, 13 F. 2d 369, 370 (C.A. 9).

There is no foundation for the argument that petitioner was not aiding Minor, the seller, but rather Cross and Gjertsen, the purchasers, by merely informing the latter of a source for the narcotics. Petitioner made no such claim or suggestion when he took the stand as a witness in his own behalf. And his words and conduct in the presence of the government's witnesses are consistent only with the view that Minor looked to petitioner for direction. There is thus no

inconsistency between this case and *United States* v. *Moses*, 220 F. 2d 116 (C.A. 3), where it was held that an agent for the purchaser had not violated the statute.[2]

2. Petitioner's complaint (Pet. 34-40) that certain instructions (Nos. 20(A), 21, 22, 23, 26, and 27; R. 309, 311-312, 314-315) were prejudicially repetitious and inconsistent is without substance.

Instruction No. 21 merely recites the applicable aider-and-abettor statute, 18 U.S.C. 2 (*supra*, p. 3). No. 23 relates this statute to the unlawful-purchase statute under count 1, and states that petitioner may be held guilty if he aided Minor in the unlawful possession of the narcotics. No. 20(A), given by "agreement" of petitioner's counsel (R. 286), is not inconsistent with No. 23, since the net effect of reading them together is to make it possible for the jury to find "from all the evidence" that petitioner had possession by reason of his aiding and abetting Minor, even though it may have been constructive, rather than physical, possession.

Instructions Nos. 26 and 27 are not repetitious of the preceding instructions, since they both relate to count 2, a separate offense from that involved in count 1. No. 26 relates the aider-and-abettor statute to the unlawful-concealment statute under count 2, and states that petitioner may be held guilty if he aided Minor in the unlawful possession of the narcotics.[3] No. 27 merely recites the possibility that even if petitioner did

---

[2] The same is true of *Morei* v. *United States*, 127 F. 2d 827 (C. A. 6), in which the defendant Platt merely informed the purchaser of narcotics of a source in another city, Platt having had no criminal connection with the source.

[3] Instruction No. 22 is not inconsistent with No. 26 (see Pet. 35), since it relates to count 1, while No. 26 relates to count 2.

aid and abet Minor in possession of the narcotics, as alleged in count 2, he could overcome the unfavorable presumption arising from possession by proving to the jury's satisfaction that the narcotics "were not unlawfully imported, and that he did not believe them to be unlawfully imported" (R. 315). Cf. *Gallegos* v. *United States,* 237 F. 2d 694, 697-698 (C.A. 10).

Nowhere in the charge is there an improper peremptory direction that the jury must find that petitioner aided and abetted Minor in illegal possession of the narcotics. Both instructions Nos. 23 and 26 require that such a finding shall be based upon "all the evidence and beyond a reasonable doubt"; and the government's requested instructions Nos. 3, 5, and 6 (R. 305) also cover the accused's presumption of innocence and the necessity that guilt be found beyond a reasonable doubt.

3. Contrary to petitioner's contention (Pet. 41-45), the evidence was sufficient to sustain his conviction for conspiracy to violate the narcotics laws as charged in count 12 (R. 11-12).

We have already alluded to the events of May 10, 1956 (*supra,* pp. 7-8). Further evidence of a conspiracy and illegal agreement is provided by the May 22, 1956 incident, when petitioner referred Cross to his "man" Minor, and Cross, in petitioner's presence, stated that his friend "wanted to get an ounce of stuff." After checking upon the friend (Turnbou), Minor arranged a meeting at which the sale to Turnbou was consummated. Minor used petitioner's automobile in expedi[illegible]ng this sale, and, upon Minor's return, the hands

of the two defendants met and they drove away in petitioner's automobile (see the Statement, *supra*, pp. 5-6).[4]

The fact that the evidence was circumstantial does not mean that it was insufficient to establish participation in a criminal conspiracy. Cf. *Glasser* v. *United States*, 315 U.S. 60, 80. The jury was specifically told (defendant's instruction No. 1 (R. 302)) that "[i]t is not the knowledge of the illegal act that makes [persons] conspirators, but an agreement to commit such illegal act." The jury also received correct instructions as to circumstantial evidence and the various aspects of conspiracy (R. 308-309, 315-318).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1958.

---

[4] The evidence as to the July 5, 1956, sale to Turnbou (see the Statement, *supra*, p. 6) is not as strong as in the two preceding incidents, but it also discloses a close relationship of petitioner's activities with the illicit sale.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—481981/P.O. 907